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SUPREME COURT, U.S.

NO. 89-7302

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

TOMMY CAGE

Petitioner

VERSUS

STATE OF LOUISIANA

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

BRIEF IN OPPOSITION BY THE STATE OF LOUISIANA

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STATEMENT OF THE CASE

On April 16, 1986 at about 11:30 a.m., two college students were waiting at a bus stop in New Orleans, returning home from their morning classes. As they attempted to board a

city bus, petitioner Tommy Cage tried to rob them He knocked one student to the steps of the bus, pulled a .38 caliber gun, then jerked a chain from the student's neck. As he did this the other student, Arthur Johnson, tried to run away. The bus driver and three other eyewitnesses testified at trial that petitioner stopped, took aim, and shot Johnson, hitting him in the lower back.

The impact of the bullet knocked Johnson forward and he fell to the ground. Petitioner then ran over to where Johnson lay on the ground, paralyzed. Johnson, according to witnesses, begged petitioner not to shoot him again, but petitioner said to Johnson, "Bitch, I told you don't run." Petitioner then shot Johnson in the head, killing him, took a medallion from Johnson's neck, and ran away.

At trial, after the four eyewitnesses identified petitioner as the perpetrator, petitioner took the witness stand and admitted firing the gun. He testified that he fired the first shot "just to be shooting" and the second time, the gun "just went off again." **State v. Cage**, 554 So.2d 39 (La. 1989).

Petitioner was found guilty of first degree murder by a jury of his peers, and that same jury, after hearing evidence at

a penalty hearing recommended that petitioner receive the death penalty. Petitioner was sentenced to death and his conviction and sentence were affirmed by the Louisiana Supreme Court. Petitioner now seeks review of the Louisiana Supreme Court decision.

REASONS FOR DENYING THE WRIT

The State of Louisiana submits that petitioner's application does not present a substantial federal question for consideration by this court. Although many allegations of violations of federal constitutional law have been made, petitioner has not demonstrated the existence of violations.

I.

THERE IS NO CAUSE TO REMAND
TO THE LOUISIANA SUPREME COURT
FOR CONSIDERATION OF THE
APPROPRIATE PENALTY

Petitioner has alleged that his case should be remanded to the Louisiana Supreme Court because that court "refused to consider the effect that two invalid aggravating circumstances have on the appropriateness of petitioner's death penalty."

Petitioner cites **Clemons v. Mississippi**, ____ U.S. _____, 46 Cr. L. Rep. 2209 (1990), as authority for this request.

The jury below found four aggravating circumstances: (1) Cage was engaged in the perpetration or attempted perpetration of armed robbery when the murder occurred; (2) Cage had previously been convicted of an unrelated armed robbery; (3) Cage knowingly created a risk of great bodily harm to more than one person; and (4) the offense was committed in an especially heinous, atrocious, or cruel manner. **State v. Cage**, supra, 554 So.2d at 45.

The Louisiana Supreme Court held that because the jury's finding of one statutory aggravating circumstance (armed robbery) was supported by the record, it was unnecessary to determine whether the jury erred in its finding regarding the other aggravating circumstances, because the failure of another aggravating circumstance would not invalidate a death penalty. The Court specifically found that no evidence introduced in the case, including the evidence of the other aggravating circumstances, introduced an arbitrary factor into the proceedings. **Cage**, supra, 554 So.2d at 46.

Under Louisiana's capital sentencing scheme, a sentencing hearing is conducted after a verdict of guilty to a first degree murder charge. La.C.Cr.Pro. art. 905 et seq.

The sentence will be life imprisonment unless the jury finds unanimously and beyond a reasonable doubt at least one statutorily defined aggravating circumstance. La.C.Cr.Pro. art. 905.3. However, having found the existence of a statutory aggravating circumstance the jury is still not required to impose the death penalty. **State v. Watson**, 423 So.2d 1130 (La. 1982); **State v. Welcome**, 458 So.2d 1235 (La. 1983). Instead, it is merely authorized to impose the ultimate penalty after considering evidence of any mitigating circumstances. La.C.Cr.Pro. art. 905.3. Unless the jury unanimously determines that the death penalty should be imposed, the defendant will be sentenced to life imprisonment without parole, probation, or suspension of sentence. If the jury cannot agree unanimously as to the sentence, a life sentence is imposed. Any sentence returned must be unanimous.

Unlike Louisiana, Mississippi law provides that for the jury to impose a death sentence, "it must unanimously find....(c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances," Miss. Code Ann. Sec. 99-19-101(3)(c) (Supp. 1989); **Clemons v. Mississippi**, 46 Cr. L. 2209, at 2212 (footnote 2).

In context with **Clemons v. Mississippi**, 48 Cr. L. Reptr. 2209 (1990), Louisiana is not a "weighing" state in the sense that a jury in a capital case must weigh the aggravating and mitigating factors and decide the issue of sentencing based upon which factors "weigh" the most. Louisiana jurisprudence and jury charges contain references to weighing, using that term in the sense of comparing the evidence in favor of the death penalty with the evidence calling for a lesser sentence. However, no mandatory result is determined by the "weighing."

The United States Court of Appeals for the Fifth Circuit has explicitly found that "an independent review of the Louisiana sentencing statute, as well as Louisiana case law, reveals that Louisiana law does not require weighing of aggravating against mitigating circumstances." **Jones v. Butler**, on rehearing, 864 F.2d 348, at 370 (5th Cir. 1988); **Wilson v. Butler**, 813 F.2d 664, 673-74, reh'g granted on other grounds, 825 F.2d 879 (5th Cir. 1987), cert. den. 108 S.Ct. 1059, 98 L.Ed.2d 1021 (1988).

The Fifth Circuit in **Jones**, **supra**, also pointed out that "Mississippi law requires a jury to weigh mitigating and aggravating circumstances while, as we have noted, **Wilson** held that Louisiana law does not." **Jones v. Butler**, 864 F.2d 348, at 371.

While the Louisiana Supreme Court does not "reweigh" the evidence in the sense of comparing aggravating and mitigating circumstances and then following that which weighs the heaviest, it does review every death sentence to determine whether the sentence is unconstitutionally excessive. La.C.Cr.Pro. art. 905.9; Rule 28, Rules of the Louisiana Supreme Court. This determination is made upon considering whether the sentence was imposed under the influence of passion, prejudice or arbitrary factors; whether the evidence supports the finding of statutory aggravating circumstances; and whether the sentence is disproportionate to the penalty imposed in other cases, considering both the offense and the offender. State v. Deboue, 552 So.2d 355, at 368 (La. 1989). With this review, neither the eighth nor the fourteenth amendments to the United States Constitution were violated.

II.

THE TRIAL COURT DID NOT IMPROPERLY INSTRUCT THE JURY REGARDING REASONABLE DOUBT

The Louisiana Supreme Court, in its decision below, adequately answered this allegation made by Petitioner. **Cage, 554 So.2d 39, at 41.**

III.

PETITIONER'S SENTENCE OF DEATH DID NOT RESULT FROM VIOLATIONS OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner has alleged numerous violations of constitutional rights. The Louisiana Supreme Court has adequately answered these allegations:

A. Victim impact evidence. A review of the argument complained of (Tr. 435-6) shows the innocuous nature of the argument presented by the prosecutor.

B. Prosecutorial misconduct. See **Cage, 554 So.2d 39, at 43-45.**

C. Noncompliance with Louisiana sentencing standards. See **Cage, 554 So.2d 39, at 41-42.**

D. Error during the penalty phase. See **Cage, supra, 554, So.2d 39, at 42-43.**

CONCLUSION

Petitioner's request for a writ of certiorari to review the decision of the Louisiana Supreme Court should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Response to the attorney for petitioner, by United States mail, this 12th day of July, 1990, addressed to:

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